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DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT OF TENNESSEE
20TH JUDICIAL DISTRICT

BUSINESS COURT PILOT PROJECT

LANCER TISDALE, on behalf of himself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
WILSON BANK AND TRUST,)
)
Defendant.)
)

Case No: 19-400-BC

DAVIDSON CO. CHANCERY CT.
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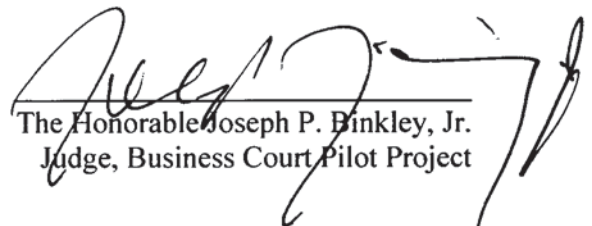
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ORDER DENYING
DEFENDANT WILSON BANK AND TRUST'S MOTION TO DISMISS
PLAINTIFF LANCER TISDALE'S SECOND AMENDED COMPLAINT

This matter came before the Court on the 30th of September, 2019. For the reasons set forth in the attached Transcript of Court Proceedings, the Motion to Dismiss is DENIED.

IT IS SO ORDERED.

Entered this ____ day of _____, 2019.


The Honorable Joseph P. Binkley, Jr.
Judge, Business Court Pilot Project

PREPARED FOR ENTRY BY:

/s/ Martin F. Schubert

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 2019, a copy of the above document has been delivered to the following persons by Electronic Mail and/or United States mail first class to:

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IN THE DAVIDSON COUNTY CHANCERY COURT
AT NASHVILLE

LANCER TISDALE, on behalf of)
himself and all other similarly)
situated,)
Plaintiff,)

V.) 19-400-II

WILSON BANK AND TRUST,)
Defendant.)

TRANSCRIPT OF COURT PROCEEDINGS

THE HONORABLE JOE P. BINKLEY, JR., PRESIDING
SEPTEMBER 30, 2019

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1 and, therefore, they have not stated a claim. Thank
2 you.

3 THE COURT: All right. Very good. I
4 know this is a business court case, and the model is
5 for me to do an order. My colleagues have
6 continually told me that I am doing too much in this
7 job, but it's really not as much as I did in private
8 practice, but it is a lot. So I'm going to give you
9 an opinion today. It's going to be verbal, but it's
10 going to be on the record, and an order can be
11 prepared from the verbal ruling. I've got way too
12 much to do to take things under advisement, and
13 particularly this month is one of those months that I
14 am jam-packed. And I did it to myself, but that's
15 just the way it is. So I've got to keep moving. And
16 I know this better right now than I will know it
17 tomorrow or six months from now. So I'm going to do
18 it today. So y'all just stand by, and I'll give you
19 an opinion shortly. Thank you.

20 (Whereupon, after a short break, the following
21 proceedings were had.)

22 THE COURT: All right. So thank y'all,
23 again, for being patient and waiting on me to get my
24 thoughts together. So here we go. First of all, in
25 reviewing the exhibits, which were attached to the

1 complaint, which, of course, I'm entitled to consider
2 in determining a motion to dismiss -- actually, what
3 I wanted to do for the record, before doing this, is
4 to state the standard for a 12.02(6) motion to
5 dismiss, as stated in Webb v. Nashville Area Habitat
6 for Humanity, 346 S.W.3d 422, our State Supreme Court
7 of Tennessee 2011 opinion.

8 And at Page 426 of that opinion, The Court
9 states the following: A Rule 12.02(6) motion
10 challenges only the legal sufficiency of the
11 complaint, not the strength of the plaintiff's proof
12 or evidence. The resolution of a 12.02(6) motion to
13 dismiss is determined by examination of the pleadings
14 alone, and, of course, any attachments to the
15 pleadings, which we have Exhibits A, B, C and D,
16 which are a part of my consideration, because they're
17 attached to the complaint.

18 And to continue with the quote from Webb, A
19 defendant who files a motion to dismiss admits the
20 truth of all of the relevant and material allegations
21 contained in the complaint, but asserts that the
22 allegations fail to establish a cause of action.

23 In considering a motion to dismiss, the courts
24 must construe the complaint liberally, presuming all
25 factual allegations to be true, and giving the

1 plaintiff the benefit of all reasonable inferences.
2 Trial courts should grant a motion to dismiss only
3 when it appears that a plaintiff can prove no set of
4 facts in support of the claim that would entitle the
5 plaintiff to relief. So I'm following that mandate,
6 which I am required to do, as cited in Webb v.
7 Nashville Area Habitat for Humanity.

8 All right. So in reviewing, I tried to write
9 some of this out, and, really, my handwriting is
10 horrible. I tried to keep my thoughts together. I
11 might hesitate a little bit, but I want to make sure
12 that I'm stating it succinctly for the record that's
13 being kept by this fine court reporter here, which I
14 appreciate.

15 So Exhibit A to the complaint, among other
16 things, contains a portion of the contract that
17 Wilson Bank and Trust has with the Plaintiff and all
18 other customers. And this contract is, of course, a
19 part of the complaint, because it was attached. So
20 Exhibit A is entitled Your Deposit Account, Terms and
21 Conditions. And the portion of part of the contract
22 entitled Statements is one of the areas that was
23 argued today. But as we pointed out, we don't really
24 have any statements in the record, at this time.
25 Mr. Stranch pointed me to a statement, but it's not

1 something that I can consider today. Therefore, I
2 don't think I can consider anything about that
3 portion of the contract entitled Statements.

4 And, of course, that portion states the
5 following, and it's very tiny, so I'm going to take
6 it slow and make sure I get it correct. I'm going to
7 cite it for the record. You must examine your
8 statement of account with reasonable promptness. If
9 you discover or reasonably should have discovered any
10 unauthorized signatures, alterations, incorrect
11 payment amounts, or missing or incorrectly credited
12 deposits, you must promptly notify us of the relevant
13 facts. As between you and us, if you fail to do
14 either of these duties, you will have to bear the
15 loss yourself, unless you prove that we did not pay
16 the item in good faith. The loss could be not only
17 with respect to items on the statement, but other
18 items, unauthorized signature or signatures by the
19 same wrongdoer. You agree that the time you have to
20 examine your statement and report to us will depend
21 on the circumstances, but will not in any
22 circumstance exceed a total of 30 days from when the
23 statement is first sent or made available to you.

24 You further agree -- this is the portion that
25 was argued more than any of the other part of the

1 statements portion of the contract. This paragraph
2 continues, under statements, as follows: You further
3 agree that if you fail to report any unauthorized
4 signatures, alterations, forgeries, incorrect payment
5 amounts, missing or incorrect credited deposits or
6 any other errors to your account within 60 days of
7 when we first send or make the statement available,
8 you cannot assert a claim against us on any items in
9 that statement. As between you and us, the loss will
10 be entirely yours. This 60-day limitation is without
11 regard to whether we use good faith. The limitation
12 of this paragraph is in addition to that maintained
13 -- I'm sorry. Let's see. I have a hard time reading
14 it -- is in addition to that contained in the first
15 paragraph of this section.

16 Okay. So there was no discussion of this
17 portion of the contract in the complaint. There is
18 not an answer that's been filed by Wilson Bank and
19 Trust, the Defendant. So The Court, I cannot
20 consider the bank's argument that these alleged
21 errors were not reported by the Plaintiff within 60
22 days within receiving the statement or within 60 days
23 of when the statement was made available to the
24 Plaintiff. So, basically, this issue is not before
25 me, at this time.

1 All right. So then let me just comment on
2 Exhibit B to the second amended complaint. There are
3 several duplications in Exhibit B that are in Exhibit
4 A, and C and D. And, really, it wasn't discussed, so
5 I'm not really going to discuss it. So it wasn't
6 discussed in this argument. I know we had some
7 discussion in the papers. But a good bit of that may
8 have been -- that discussion may have been with the
9 counts that have been removed by the Plaintiff
10 voluntarily.

11 So then we turn to Exhibit C. So the first --
12 well, there are two pages in Exhibit C. The first
13 page is entitled, again, Additional Deposit Account,
14 Terms and Conditions. And the paragraph that has
15 been referenced in our argument and, more
16 specifically, discussed in the papers filed by
17 counsel of the parties, is the paragraph entitled
18 Payment Order of Items. And I'm going to read the
19 paragraph for the record. That paragraph reads as
20 follows: The law permits us to pay items, such as
21 checks or drafts, drawn on your account in any order.
22 We generally pay electronic transactions first, and
23 then checks in serial number order. If an item is
24 presented without sufficient funds in your account to
25 pay it, we may, at our discretion, pay the item

1 (creating an overdraft) or return the item (NSF).
2 For amounts of the overdraft and NSF fees, refer to
3 product/fee brochure. And that is Exhibit D.

4 The paragraph entitled Payment Order of Items
5 continues to read as follows: We encourage you to
6 make careful records and practice good account
7 management. This will help you avoid writing checks
8 or drafts without sufficient funds and incurring the
9 resulting fees.

10 So the Plaintiff, as a customer of the
11 Defendant, Wilson Bank and Trust, has an
12 interpretation of this portion of the contract, and
13 the Plaintiff's interpretation is that in this
14 portion of the contract, the bank promises they will
15 not charge more than one fee on a returned item, no
16 matter how many times the merchant may present that
17 item to the bank for payment. And, therefore, the
18 Plaintiff's position is that if the bank does that,
19 and the bank has done that, then the bank has
20 breached their promise not to charge multiple fees
21 for multiple presentations of the same item when the
22 Plaintiff, customer, does not have sufficient funds
23 for the bank to pay the merchant the item, pay the
24 item that is presented by the merchant. And, of
25 course, all of this is premised on the fact that the

1 Plaintiff, or the customer, does not have sufficient
2 funds in his account to pay this item when the item
3 is presented on multiple occasions to the bank for
4 payment.

5 So I think my next inquiry is then to determine
6 whether or not this interpretation of the bank's
7 contract on the Plaintiff is what the courts have
8 called "a reasonable interpretation". And in making
9 this inquiry, what I have to look at is the language
10 of the contract to determine if that interpretation
11 is reasonable. So the language in Exhibit C,
12 specifically, the paragraph that is entitled Payment
13 Order of Items, could have been more clear in the
14 portion of this paragraph that is payment order of
15 items where it says -- and so here is the quote. I
16 need to do the entire sentence. If an item is
17 presented without sufficient funds in your account to
18 pay it, we may, at our discretion, pay the item
19 (creating an overdraft), which, really, is not part
20 of the discussion today. But my observation is that
21 it could have been more clear. That portion of that
22 sentence could have said, after paying the item,
23 creating an overdraft, which would include the
24 customer paying a fee to the bank. But the or part
25 is what we are talking about today, or return the

1 item (NSF). And, again, I believe it could have been
2 helpful if the language had said, in that case, the
3 customer would be charged a fee.

4 The complaint does contain language from other
5 bank contracts that makes it clearer, and that's
6 specifically referenced in the second amended
7 complaint at Paragraphs 43 and 44. Paragraph 43
8 states First Hawaiian Bank. It includes similar
9 disclosure in its online banking agreement in all
10 capital letters as follows: You agree that multiple
11 attempts may be made to submit a returned item for
12 payment and that multiple fees may be charged to you
13 as a result of a returned item and resubmission.
14 That's just an example of what it could have been in
15 the Wilson Bank and Trust contract that would have
16 made it clearer to the customer, the Plaintiff in
17 this case.

18 Paragraph 44, Klein Bank similarly states in its
19 online banking agreement as follows: We will charge
20 you an NSF/overdraft fee each time, one, a bill
21 payment, electronic or check, is submitted to us for
22 payment from your bill payment account when at the
23 time of posting, your bill payment account is
24 overdrawn, would be overdrawn if we paid the item
25 (whether or not we, in fact, pay it) or does not have

1 sufficient available funds; or, two, we return,
2 reverse, or decline to pay an item for any other
3 reason authorized by the terms and conditions
4 governing your bill payment account. We will charge
5 an NSF/overdraft fee as provided in this section
6 regardless of the number of times an item is
7 submitted or resubmitted to us for payment,
8 regardless of whether we pay the item, or return,
9 reverse, or decline to pay the bill payment.

10 Now, looking at Exhibit D, and that is a
11 one-page exhibit, it's the Wilson Bank and Trust fee
12 schedule. The term returned item fee is stated in
13 the fee schedule, but it is not stated in the plural.
14 It's only the singular, returned item fee, not return
15 item fees. And it was pointed out by Mr. Stranch, it
16 would have helped the understanding of the customer
17 if there had been an S on the word fee. And then
18 looking at the fee schedule, as, again, pointed out
19 by Mr. Stranch, there is not a definition or a
20 statement of what "NSF" means, and whether or not --
21 no statement of what it means or what charges there
22 may be for an NSF.

23 So in looking at all of these contract
24 provisions, which I have previously discussed, The
25 Court is of the opinion that the Plaintiff's

1 interpretation of these provisions of the contract is
2 a "reasonable interpretation" at this time. And at
3 this time, The Court finds that the contract is
4 ambiguous in those areas. Therefore, Count Two of
5 the Plaintiff's second amended complaint, which is
6 the breach of contract claim, survives the motion to
7 dismiss for failure to state a claim.

8 Count Three, which is Plaintiff's claim for
9 breach of the covenant of good faith and fair
10 dealing, which the claim, really, is a part of -- is
11 attached to the breach of contract claim, and,
12 therefore, the breach of covenant of good faith and
13 fair dealing also survives the motion to dismiss for
14 failure to state a claim.

15 And Count Four, which is the claim for unjust
16 enrichment -- and I might state that the claim for
17 unjust enrichment, our case law states that the claim
18 for unjust enrichment, the quasi contract, contracts
19 implied in law and/or claim for quantum meruit are
20 all the same, as cited in Paschall's, Inc. v. Dozier.
21 And that's 407 S.W.2d 150. And the specific portion
22 of that opinion, Page 53, states the following:
23 Actions brought by theories of unjust enrichment,
24 quasi contract, contracts implied in law and quantum
25 meruit are essentially the same. Courts frequently

1 employ the various terminology interchangeably to
2 describe that class of implied obligations where, on
3 the basis of justice and equity, the law will impose
4 a contractual relationship between parties,
5 regardless of their assent thereto.

6 But at the same time, it is an alternative
7 pleading, claim, alternative claim and plea, to
8 breach of contract. So it only becomes applicable,
9 that is Count Four, claim for unjust enrichment, in
10 the event The Court may later find that the breach of
11 contract claim for some reason may become dismissed.
12 So for now, even though they are alternative claims,
13 the alternative claim of unjust enrichment, will
14 remain and will survive the motion to dismiss for
15 failure to state a claim, because, as I stated, it is
16 an alternative claim to breach of contract. And we
17 don't know what the future holds for any of the
18 claims, but that remains as an alternative claim to
19 breach of contract.

20 And I think I have covered everything. Does
21 anybody have any questions? I may not be able to
22 answer them, but I'll be glad to field them.

23 MR. STRANCH: Nothing from the
24 Plaintiffs. Thank you, Your Honor.

25 MR. MULQUEEN: Nothing from the

1 Defendant. Thank you.

2 THE COURT: Very good. Well, thank you
3 very much. Both sides, a great job with
4 presentation. I really appreciate the hard work that
5 y'all do on all of these cases, particularly these
6 cases that I don't see much of. I really appreciate
7 the education. Y'all did a great job doing that.
8 And even though a lot of the argument was basically
9 background and really not anything I could consider
10 on a motion to dismiss for failure to state a claim,
11 both from the Plaintiff and the Defendant, it helped
12 me understand, and I appreciate it. So thank y'all
13 very much.

14 MR. STRANCH: Thank you, Your Honor.

15 MR. MULQUEEN: Thank you, Your Honor.

16 (Whereupon, no further proceedings were had relevant
17 to this cause.)
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CERTIFICATE

I, Lea Anne Gray, court reporter for the State of Tennessee, do hereby certify that the foregoing transcript was recorded stenographically by me and reduced to typewritten form by me.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript, to the best of my ability, of the testimony given by the said witness at the time and place specified herein.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of October, 2019.

LEA ANNE GRAY, LCR 445
Court Reporter for the
State of Tennessee

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